No. 98-591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ALBERTSON'S, INC.,

Petitioner,

v.

HALLIE KIRKINGBURG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

GARY PHELAN
Counsel of Record
GARRISON, PHELAN,
LEVIN-EPSTEIN, CHIMES
& RICHARDSON, P.C.
405 Orange Street
New Haven, CT 06511
(203) 777-4425

DANIEL S. GOLDBERG
HEDIN & GOLDBERG
2100 Stevens Avenue South
Minneapolis, MN 55404
(612) 871-5500

Attorneys for *Amicus Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

QUESTION PRESENTED

Should the determination of whether the plaintiffs' monocular vision is a "disability" under the Americans with Disabilities Act, 42 U.S.C. §12102(2)(A), be made without considering his use of mitigating measures of self-accommodations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Legislative Authorities:

Federal Regulations:

INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes.[1] NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs on employment law and civil rights issues. Some recent cases before this Court and other courts are: *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998); *Oncale v. Sundowner Offshore Services Inc.*, ___ U.S. ___, 118 S.Ct. 998 (1997); *Oubre v. Entergy Operations, Inc.*, ___ U.S. ___, 118 S.Ct. 1466 (1997); *Cleveland v. Policy Management Systems Corp.*, No. 97-1008, *cert. granted*, ___ U.S. ___, 67 U.S.L.W. 3228 (U.S. 10/5/98); *McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, ___ U.S.___, 117 S.Ct. 958 (1997); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 748 (5th Cir. 1995); and *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5th Cir. 1995).

NELA members have brought numerous cases under the Americans with Disabilities Act (ADA). NELA mem-

---

[1] The parties have consented to the filing of this brief; this consent has been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. No persons other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

bers have also represented thousands of individuals in this country who are victims of employment discrimination based on disability status. One of the primary purposes of NELA is to represent, protect and defend the interests of employees involved in workplace disputes, including workers who are involved in ADA litigation.

This case presents an opportunity to clarify that the question of whether an individual has a "disability" should be made without considering the individual's use of mitigating measures such as medications, prosthetic devices and auxiliary aids. NELA submits this brief to urge the Court to conclude that the individual's use of mitigating measures should not be considered when determining whether the person has a substantial limitation of a major life activity.

STATEMENT OF THE CASE

Hallie Kirkingburg had been driving commercial trucks since 1979. He had an impeccable driving record. Albertson's hired him as a driver in 1990 in its distribution center in Portland, Oregon. Before he started working for Albertson's, he was examined by a physician who certified that his vision met the requirements established by the Department of Transportation's ("DOT") regulations. Albertson's transportation manager told Kirkingburg after the road test that "it is my considered opinion that this driver possesses superior driving skill to operate safely the type of commercial vehicles listed above." Kirkingburg was again examined by a physician and his vision was recertified after he had been in the job for several months.

The visual acuity in Kirkingburg's left eye is 20/200 and has been that way since birth. A visual acuity rating of 20/200 is well below what DOT regulations require. His poor vision in the left eye is caused by amblyopia, a condition which is commonly referred to as "lazy eye" which cannot be corrected. His right eye has a visual acuity rating of 20/20, with corrective lenses.

After a long-term absence of over a year caused by a non-driving, work-related injury, Kirkingburg was required in November, 1992 under the company's return to work policies to have his vision examined again to obtain recertification under DOT's standards. After accurately determining that Kirkingburg's vision in his left eye was 20/200, the examining physician refused to recertify him under DOT's regulations.

After he was denied certification, Kirkingburg applied for a waiver of the regular vision requirements under the Federal Highway Administration's ("FHWA") vision waiver program. To secure a waiver, the applicant must establish, among other things, that he has three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which the applicant received a citation for a moving violation and (3) more than two convictions for any other moving violations in a commercial vehicle. 57 Fed. Reg. 31,458 (1992). The applicant is also required to present proof from an optometrist certifying that his visual deficiency has not deteriorated since his last examination, that the vision in one eye is at least correctable to 20/40, and that he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31,460.

Kirkingburg told Albertson's that he had applied for a waiver under the program. However, Albertson's fired him from his truck driver position, explaining that it would not accept a waiver, because of its policy of employing only drivers who "meet or exceed the minimum DOT standards." After Kirkingburg informed Albertson's several months later that he had obtained a vision waiver, Albertson's again would not accept it, and refused to reconsider his termination.

Kirkingburg filed suit against Albertson's under Title I of the Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*, claiming that Albertson's discriminated against him because of his visual disability. The district court granted the employer's summary judgment motion, reasoning that Kirkingburg had failed to present a *prima facie* case. The Ninth Circuit reversed the decision and remanded the case to the district court, reasoning that Kirkingburg had presented uncontroverted evidence that due to the condition and permanence of his amblyopia, which rendered him almost totally blind in his left eye, he was substantially limited in the major life activity of seeing. *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1232 (9th Cir. 1998). Although Kirkingburg developed subconscious mechanisms to compensate for the detrimental effect his inability to see out of one eye had on his peripheral vision and depth perception, the court concluded that "the *manner* in which he sees differs significantly from the manner in which most people see." *Id.*

The Ninth Circuit also concluded that even if Kirkingburg was not disabled, he would still have a *prima facie* case under the ADA because the employer regarded him to be disabled. *Id.* The court reasoned that there

was a genuine issue of fact as to whether the employer regarded him to be disabled in light of evidence that one of Albertson's managers described Kirkingburg as "blind in one eye or legally blind." *Id.*

SUMMARY OF THE ARGUMENT

The ADA was adopted by Congress in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12182(b)(1). Many of those individuals with disabilities often use mitigating measures, such as medications, prosthetic devices or auxiliary aids to accommodate their disabilities.

The ADA is a remedial statute which must be construed broadly to effectuate its purpose. Some courts have narrowly interpreted the term "disability" by ruling that an individual's use of a mitigating measure should be taken into consideration when determining whether the individual is covered under the ADA. However, eight of the ten Circuit Courts of Appeals that have addressed the question have rejected that position. *Compare Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998); *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 629-30 (7th Cir. 1998); *Kirkingberg v. Albertson's, Inc.*, 143 F.3d 1228, 1232-33 (4th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 857-65 (1st Cir. 1998); *Doane v. City of Omaha*, 1125

F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996); with *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, No. 97-1943, 1999 WL 5326 (U.S. Jan. 8, 1999); *Gilday v. Mecosta County*, 124 F.3d 760, 767, 768 (6th Cir. 1997).[2] *Amicus* asks this Court to embrace the views of the overwhelming number of courts that have broadly interpreted the statute to exclude consideration of mitigating measures.

The ADA's definition of disability is derived from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B). Courts interpreting the definition of "handicapped individual" under the Rehabilitation Act have routinely excluded consideration of mitigating measures. Both the ADA's legislative history and the Equal Employment Opportunity Commission's ("EEOC") Interpretive Guidance also state that mitigating measures should not be considered when determining whether an individual is substantially limited in a major life activity and therefore covered under the ADA. Interpreting the ADA to exclude consideration of mitigating measures is consistent with the statue's broad remedial purposes. Moreover, considering mitigating measures eliminates the first prong of the ADA's definition of disability, and is relevant only to the "accommodation" side of the ADA mandate, rather than the "definition" side. Finally, the ADA should not be interpreted to discourage individuals from attempting to control their impairments, and visual impairments in particular should not be excluded from the ADA's coverage merely because the impairment can be easily mitigated.

[2] In *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996), the Fifth Circuit stated in *dicta* that an individual's use of mitigating measures should be considered when determining whether the individual is substantially limited in a major life activity. *Id.* at 191-92 n. 3. However, the fifth Circuit abandoned that position in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 n. 5 (5th Cir. 1998).

ARGUMENT

I. MITIGATING MEASURES SHOULD NOT BE CONSIDERED WHEN DETERMINING WHETHER AN INDIVIDUAL HAS A DISABILITY UNDER THE FIRST PRONG OF THE ADA'S DEFINITION OF DISABILITY.

A. Mitigating Measures Were Not Considered Under the Rehabilitation Act.

The ADA defines the term "disability" as:

> (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (b) a record of such an impairment; or
>
> (c) being regarded as having such an impairment.

42 U.S.C. §12101(2). The ADA's definition of disability is derived "almost verbatim" from the definition of "handicapped individual" contained in the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B); *Bragdon v. Abbott*, 118 S.Ct. 2196, 2202 (1998). The ADA provides at 42 U.S.C. §12201(a) that:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards used under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790

et seq.) or the regulations issued by the Federal agencies pursuant to such title.

In *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), this Court interpreted that language to "require [ ] us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." *Id.* at 2202.

The Rehabilitation Act's regulations define "physical or mental impairment" as:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. §84.3(j)(2)(i) (1997).

The Rehabilitation Act's regulations contain a representative list of "major life activities" and define the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3(j)(2)(ii) (1997). The list of major life activities "is illustrative, not exhaustive." *Bragdon*, 118 S.Ct. at 2205 (concluding that reproduction is a major life activity even though not specifically enumerated in the regulations).

This Court observed in *Bragdon* that "[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Id.* at 2208 (citations omitted). Courts have never considered the use of mitigating measures when interpreting the definition of "handicapped" under the Rehabilitation Act and its regulations. Therefore, this Court should similarly exclude consideration of the use of mitigating measures when analyzing whether the individual is substantially limited in one or more major life activities.

In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), for example, the Ninth Circuit held that epilepsy was a handicap even though it was controlled by medication. *Id.* at 574. In *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991), the Second Circuit stated that "[w]e are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as being substantially limited in their ability to care for themselves." *Id.* at 641. The First Circuit concluded in *Cook v. State of Rhode Island Dep't of Mental Health, Retardation and Hospitals*, 10 F.3d 17 (1st Cir. 1993), that an individual with morbid obesity had a handicap under the Rehabilitation Act, even though she could treat the manifestations of her dysfunctional metabolism through fasting or undereating. *Id.* at 24.

Although the plaintiff's diabetes, carpel tunnel syndrome and depression were controllable with medication, the court in *Miles v. General Services Administra-*

tion, 1995 WL 766013 (E.D. Pa. 1995), concluded that the plaintiff was handicapped within the meaning of the Rehabilitation Act. The court in *Liff v. Secretary of Transportation*, 1994 WL 579912 (D.D.C. 1994), rejected the defendant's argument that the plaintiff was not "handicapped" because her depression was controlled by medication, reasoning that "Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regard to medication." The court relied, in part, on the language and purpose of the Rehabilitation Act in *Fallacaro v. Richardson*, 964 F.Supp. 87 (D.D.C. 1997), for its conclusion that a person who was totally blind was handicapped under the statute, even though she had 20/20 vision with corrective lenses.[3]

In *Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995), the Tenth Circuit observed that "Congress intended that the relevant case law developed under the Rehabilitation Act be generally be applicable to the term 'disability' under the ADA." *Id.* at 897 (citing 29 C.F.R. pt. 1630, App. §1630.2(g)). This Court should reject the Tenth Circuit's attempt in the instant case to disregard its own admonition and construe the ADA's definition of

[3] See also, e.g., *Strathie v. Dep't of Transportation*, 716 F.2d 227, 228-29 (3d Cir. 1983) (undisputed that individual with a hearing impairment was handicapped under the Rehabilitation Act even though with the use of a hearing aid his hearing was corrected to an acceptable level under relevant state law); *Bentivegna v. U.S. Dep't of Labor*, 694 F.2d 619, 621-22 (9th Cir. 1982) (accepting without discussion that individual with insulin-dependent diabetes was handicapped under the Rehabilitation Act).

disability more narrowly than the Rehabilitation Act's definition of the term of "handicap." Because the Rehabilitation Act's definition of "handicap" did not require that mitigating measures be considered, repeating the same definition of "disability" under the ADA clarified that Congress intended to incorporate that interpretation into the ADA as well.

B. The ADA's Legislative History Demonstrates that Mitigating Measures Should Not Be Considered When Determining Whether an Individual Has a Disability.

The starting point for interpreting a statute "is the language of the statute itself." *Arnold v. United Parcel Service*, 136 F.3d 854, 857 (1st Cir. 1998) (citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). Most courts that have examined the question have concluded that the ADA does not clearly state whether mitigating measures should be considered when examining whether an individual has a substantial impairment of one or more major life activities. See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 467 (5th Cir. 1998); *Arnold v. United Parcel Service*, 1367 F.3d 854, 859 (1st Cir. 1998) ("A reasonable person could interpret the plain statutory language to require an evaluation either before or after ameliorative treatment."); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

If a statute's text is not absolutely clear, the next source for guidance to ascertain the statute's meaning is its legislative history. *Arnold*, 136 F.3d at 858. The ADA's legislative history plainly demonstrates that

mitigating measures should not be considered when determining whether an individual has a substantial impairment of one or more major life activities.

In describing the first prong of the definition of disability, the House Judiciary Committee Report states that:

> The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment are controllable by medication. H.R. Rep. No. 101-485 (III) at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

Similarly, the House's Education and Labor Committee Report provides that:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication. H.R. Rep. No. 101-485 (II) at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report").

The Senate Report also provides that determining whether a person has a disability under the ADA

"should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116 at 23 (1989) ("Senate Report").

The Senate Report does contain language which some courts have interpreted to be inconsistent with the position that the question of whether a condition is covered under the "first prong" of the definition of disability excludes consideration of mitigating measures.[4] See, e.g., *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998). While discussing the third prong of the definition of disability, the Senate Report states that:

> Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Senate Report at 24.

In *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1st Cir. 1998), the First Circuit concluded that these

---

[4] The "first prong" of the definition of disability refers to whether the individual has a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. §12102(2)(A). The "third prong" of the definition of disability refers to someone who does not have a "disability" under the first prong of the definition but is "regarded" by the employer as having such an impairment. 42 U.S.C. §12102(2)(C).

two passages from the Senate Report were not inconsistent, reasoning that "these passages can be easily squared by recognizing that an individual could have a 'disability' under both prong one (having an impairment that substantially limits a major life activity) and prong three ('regarded as' having such an impairment) at the same time; one does not preclude the other." *Id.* at 860 (emphasis in original). Moreover, the House Reports, which came after the Senate Report, did not incorporate the Senate Report's discussion of medicated conditions under the third prong of the definition of disability. That omission led the Fifth Circuit to conclude that:

> Given that much of the structure and language of the House Report was borrowed from the Senate Report, it seems that the House Committees were aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 468 (5th Cir. 1998).[5]

[5] The Fifth Circuit also observed that ". . . the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed." *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 468 (5th Cir. 1998).

C. The EEOC's Interpretive Guidance Also States that Mitigating Measures Should Not Be Considered When Determining Whether an Impairment Substantially Limits a Major Life Activity.

If the plain language and legislative history do not clarify the statute's meaning, a court must defer to the interpretation of the agency charged with enforcing the statute, provided the interpretation "flows rationally from a permissible construction of the statute." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (citations omitted). The ADA authorized the EEOC to issue regulations to enforce the statute. 42 U.S.C. §12116 (1994). The EEOC exercised that authority by promulgating regulations and attaching to those regulations guidelines for interpreting the ADA. *Id.* at 863. Although the EEOC's interpretive guidelines are not, like regulations, controlling, they "constitute a body of experience and informed judgment to which courts and litigants may properly result for guidance." *Bragdon v. Abbott*, 118 S.Ct. 2196, 2207 (1998) (citation omitted).[6]

In its Interpretive Guidance, the EEOC states that the existence of an impairment must be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(h). The guidelines later elaborate that the "determination of whether an individual is substantially limited in a major life activity" must be

[6] In *Bragdon*, this Court looked to the EEOC's pronouncements for guidance in concluding that an individual's asymptomatic HIV disease was a substantial limitation of the major life activity of reproduction. *Id.* at 2209.

made "without regard to mitigating measures such as medicines or assistive or prosthetic devices." 29 C.F.R. pt. 1630 App. §1630.2(j).[7] The EEOC's Interpretive Guidance also provides that:

> An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. pt. 1630, App. §1630.2(j).

This Court has held that an agency's interpretation of a statute it administers "should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). There is no conflict between the EEOC's interpretive guidance and either the statute or its legislative history. See *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996). Rather, "[t]he EEOC's interpretation

[7] The United States Department of Justice ("DOJ"), which enforces the ADA's prohibition of disability discrimination in employment in state and local government entities, has also stated that "disability should be assessed without regard to the availability of mitigating measures." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 864 (1st Cir. 1998) (quoting 28 C.F.R. Part 35, App. A §35.104).

is not merely 'permissible;' it is entirely consistent with the ADA's legislative history and broad remedial purposes." *Arnold*, 136 F.3d at 864.

D. Interpreting the First Prong of the ADA's Definition of Disability to Exclude Consideration of Mitigating Measures Is Consistent with the Statute's Broad Remedial Purpose.

When construing a statute, a court must "interpret the words of [the statute] in light of the purposes Congress sought to serve." *Arnold v. United Parcel Services, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (citations omitted). The ADA is a "broad remedial statute." *Penny v. United Parcel Service, Inc.*, 128 F.3d 408, 414 (6th Cir. 1997). Remedial legislation like the ADA "should be construed broadly to effectuate its purpose." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998); see also *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (observing that the Federal Rehabilitation Act and its regulations should be interpreted broadly).

In the employment discrimination arena, the ADA's fundamental purpose is "to protect individuals who have an underlying medical condition or other limiting impairment, but who are in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original) (citations omitted). In *Arnold*, the First Circuit concluded that "[c]onceptually, it seems more consistent with Congress' broad remedial goals, and it also makes more sense, to

interpret the words 'individual with a disability' more broadly, so the Act's coverage protects more types of people against discrimination." 136 F.3d at 861.[8] The Ninth Circuit reached the same conclusion, in the instant case, reasoning that the ADA "was drafted in broad language in order to protect a large class of physically impaired individuals from unwanted discrimination—it was not drafted narrowly to protect only those with the most severe disabilities." *Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1233 (9th Cir. 1998), *cert. granted*, ___ U.S. ___, No. 98-591, 1999 WL 5332 (1999). Employers are not jeopardized by a broad interpretation of the term "disability" because individuals seeking protection under the statute must still be "qualified" to perform the essential functions of the job. 42 U.S.C. §§12111(8), 12112(a) (1994); see *Kirkingburg*, 143 F.3d at 1233; *Arnold*, 136 F.3d at 861-62.

This Court should also reject the argument that if mitigating measures are not considered, the definition of "disability" becomes so broad, so all-encompassing, that the concept itself becomes nearly meaningless—that is, it becomes a condition that affects simply too many American employees. Quite simply, sheer numbers of protected individuals have never been critical for either Congress or this Court when interpreting a civil rights statute. Title VII's prohibition against race discrimination protects all employees—millions and millions of workers—and its prohibition against sex discrimination protects all men and all women, provided their employers employ 15 or more full-time workers. The Equal Pay Act and the ADEA protect untold millions of workers. The Reconstruction Civil Rights Amendments protect all of us. When viewed against the broad sweep of other civil rights legislation, the so-called "meaningless" argument itself becomes meaningless and illogical.

[8] The *Arnold* court's interpretation mirrors this Court's observation in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) that when interpreting the definition of "handicap" under the Federal Rehabilitation Act "a broad definition, one not limited to the so-called 'traditional handicaps,' is inherent in the statutory definition." *Id.* at 280 n. 5.

E. Considering Mitigating Measures Eliminates the First Prong of the ADA's Definition of Disability.

Considering mitigating measures and devices to evaluate if an individual is disabled under the ADA will lead to an absurd result: it will ultimately render the first prong of the definition of "disability" meaningless. Today, because of advancements in medicine and science, a great many medical conditions and impairments are controlled by medication, therapy, surgery, medical devices or other ameliorative measures. For example, persons with diabetes dependent on insulin are able to keep the effects of their condition under control with the administration of insulin. Persons with hearing loss ameliorate their condition with a hearing aid. The examples are countless. There are, however, medical conditions for which medicine and science have yet to develop controlling devices. There is no known measure that controls the debilitating effects of Amyotrophic Lateral Sclerosis (ALS, or otherwise known as Lou Gehrig's Disease). While treatments for AIDS may slow down the progression of the disease, there is not yet any measure that completely eliminates its impair-

ing effects. Adopting a rule that determines whether a condition is a "disability" under the first prong of the ADA reduces the statute to a protection for only a select group of persons—those suffering from impairing conditions for which there exist no mitigating measures. Persons with conditions for which mitigating measures are available are left unprotected, and the first prong of the definition ceases to exist for them. Congress did not intend to protect one class of persons over the other.

More importantly, medical science undoubtedly will continue to advance, developing and discovering new ameliorative devices for medical conditions for which there currently exist no controls. Medical conditions without mitigating controls will become fewer and fewer. As the advancements are made, and as long as mitigating measures are considered, more and more persons will be left unprotected by the ADA. Ultimately, medicine, science and technology will render the first prong of the definition meaningless and nonexistent. Congress certainly did not intend such a result.

F. Mitigating Measures Are Relevant to the "Accommodation" Side of the ADA Mandate, Not the "Definition" Side.

The fallacy in the argument that mitigating measures rule out a physical or mental condition from being defined as a disability worthy of ADA protection is not that such measures are unimportant—they truly are—but that their importance lies in determining the employer's obligation to "accommodate" rather than in determining whether an individual is "disabled." In broad terms, the ADA requires an employer to provide a reasonable "accommodation" to a disabled worker. Mitigating measures are critically important when carrying out this mandate. An employer which permits employees to wear eyeglasses to read or operate machinery provides a minimal accommodation to those workers' impairing condition—in fact, that effort is so commonsensical, so basic, so minimal, so utterly reasonable that we normally don't even think of it as an "accommodation" within the meaning of the statute, but that is what it really is. By contrast, an employer clearly violates the ADA if it has an across-the-board policy forbidding retention of anyone (regardless of their actual job duties) who, say, wore glasses or took prescription drugs because such a policy would not provide the individualized accommodation necessitated by the ADA. "Mitigating measures" therefore are relevant when assessing whether an employer has adhered to the ADA's "accommodation" requirement, but they are not relevant to assessing whether the Act's "definition" of a disability has been met.

II. THE ADA SHOULD NOT BE INTERPRETED IN A MANNER THAT WOULD DISCOURAGE INDIVIDUALS FROM ATTEMPTING TO CONTROL THEIR IMPAIRMENTS.

In *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998), the court stated that concluding that Arnold's diabetes was not covered under the prong of the ADA's definition of disability would provide him with a disincentive to controlling his impairment, reasoning that:

> UPS's interpretation could very well produce results antithetical to its expressed concerns and to the

Act's attempt to take such concerns into account that a person with a disability is able to use medical knowledge and technology to overcome many of the effects of his illness (in Arnold's case, by a continuing regimen of medicine, proper eating habits and rest) may mean that he will, in practice, rarely require any sort of accommodation from his employer; but his achievement should not leave him subject to discrimination because of his underlying disability. He should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes under control. It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but deny protection to workers who act independently to overcome their disabilities, thereby creating a disincentive to self help.

Arnold, 136 F.3d at 863 n. 7.

Endorsing the Tenth Circuit's position on mitigating measures would not merely deter individuals from taking advantage of medical knowledge and technology. Rather, it would also deter individuals from developing "self-accommodations" for their impairment. In *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 693 (1998), for example, the court held that a police officer, blinded in one eye, was disabled under the first prong of the ADA's definition of disability even though he had developed "subconscious adjustments" which enabled him to compensate for his limitations. *Id.* at 627. According to the Eighth Circuit, Doane's "brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments

should not take him outside the protective provisions of the ADA." *Id.* at 627-28. Similarly, the plaintiff in *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998), had a learning and reading impairment which significantly restricted her ability to timely identify and decipher the written word. *Id.* at 329. Dr. Bartlett developed "self-accommodations" which improved her ability to spell and her performance on word identity and work attack tests. *Id.* at 326. The Second Circuit concluded that "[h]er history of self-accommodations, while allowing her to achieve roughly average reading skills (on some measures) when compared to the general population 'do not take [her] outside the protective provisions of the ADA.'" *Id.* at 329 (quoting *Doane*).

An individual who elects not to use an available mitigating measure because it would result in exclusion from the ADA's coverage is still placed in a precarious position because they may no longer be a "qualified" individual with a disability, 42 U.S.C. §12112(8), as defined by the ADA. In *Siefkin v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), for example, the defendant hired Siefkin, an individual with diabetes, as a probationary police officer, believing that he "could monitor his medical condition sufficiently to allow him to perform the duties of a police officer." *Id.* at 666. However, he failed to monitor his diabetes properly on one occasion and suffered a diabetic reaction while on duty driving a patrol car. *Id.* at 665. The employer terminated him and refused to give him a second chance to show that he could control his diabetes. *Id.* at 665, 666-67. The Seventh Circuit upheld the district court's dismissal of the case for failure to state a claim, reason-

ing that the plaintiff was fired because he failed to control a controllable disease. The Eighth Circuit reached the same conclusion in *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). Despite Burrough's assurance that he could keep his diabetes under control, he twice suffered a severe diabetic episode due to poor timing of his meals and activities which rendered him unable to perform his job as a police officer. The Eighth Circuit, relying on *Siefkin*, upheld the District Court's dismissal of his ADA claim, reasoning that it was legitimate for the city to expect and require its patrol officers to be functional and alert at all times while on duty. *Id.* at 507. As the facts in both *Siefkin* and *Burroughs* illustrate, interpreting the ADA in a manner that discourages individuals from controlling their impairments could also jeopardize public safety.

III. INDIVIDUALS WITH VISUAL IMPAIRMENTS SHOULD NOT BE EXCLUDED FROM THE ADA'S COVERAGE MERELY BECAUSE THE IMPAIRMENT CAN BE EASILY MITIGATED.

The courts which have concluded that individuals with corrected vision of 20/20 are not covered under the first prong of the ADA's definition of disability have focused on the relative ease of mitigating a visual impairment. In *Sutton v. United Air Lines*, 130 F.3d 893 (10th Cir. 1998), *cert. granted*, No. 97-1992, 1999 WL 5326 (U.S. Jan. 8, 1999), for example, the Tenth Circuit reasoned that "[p]laintiffs merely don their eyeglasses (or contact lenses) and go about all their normal daily activities in the same or similar condition, manner or duration as the average person in the general population." *Id.* at 903. However, there is nothing in

either the ADA's legislative history or the EEOC Regulations and Interpretive Guidance which provides that certain impairments should not be covered under the first prong of the definition of disability, if the mitigating measures for treating the impairment are either easy to use or common. In fact, the House Labor Report specifically identified another relatively common mitigating measure of a hearing aid, stating that "a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid." H.R. Rep. No. 101-485(1), at 42 (1990), *reprinted* in 1990 U.S.C.C.A.N. 334. There is no reason to distinguish between a visual impairment corrected through the use of eyewear and a hearing impairment corrected through the use of a hearing aid. See *Wilson v. Pennsylvania State Police Dep't*, 964 F.Supp. 898, 906 & n. 9 (E.D. Pa. 1997) (analogizing eyeglasses to hearing aids and observing that "[d]efendants would be hard pressed to argue that eyeglasses and contact lenses are not 'mitigating measures.'").

In an uncorrected state, individuals with visual impairments may be substantially limited in several major life activities. See, e.g., *Wilson*, 964 F.Supp. at 907 (without corrective eyewear, plaintiff's vision was blurred and unfocused and substantially limited him in several daily activities which involved seeing, such as driving, cooking, reading and caring for his infant son); *Peacock v. County of Marin*, 953 F.Supp. 306, 309 (N.D. Cal. 1997) (without corrective lenses, plaintiff would be severely limited in seeing, learning, caring for himself, participating in community activities and walking); *Sicard v. City of Sioux City*, 950 F.Supp. 1420, 1439

(N.D. Iowa 1996) (without corrective lenses, plaintiff could not read, drive an automobile, read street signs, watch television or movies, walk in unfamiliar surroundings or perform any of the duties of the firefighter position he sought). The Tenth Circuit's analysis of the issue ultimately fails because it confuses the impairment with its treatment. See *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997).

In *Fallacaro v. Richardson*, 965 F.Supp. 87 (D.D.C. 1997), the court rejected the argument that an individual who was legally blind without corrective lenses but had 20/20 vision with contact lenses was not disabled within the meaning of the Rehabilitation Act, reasoning that "[n]either as a matter of law nor common sense would we say that they are not impaired or disabled because their prosthetic device happens to be exceptionally good." *Id.* at 93. According to the *Fallacaro* court, "[i]t makes little sense to deprive an entire class of disabled individuals—the legally blind who have correctable vision—of the protections of the Act merely because it is so easy to accommodate their disability." *Id.* The *Fallacaro* court's observation is equally applicable where, as here, the mitigating measure relied upon to improve one's vision is the subconscious mechanisms developed to cope with the visual impairment.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
600 Harrison Street
Suite 535
San Francisco, CA 94107
(415) 227-4655

GARY PHELAN
Counsel of Record
GARRISON, PHELAN, LEVIN-EPSTEIN, CHIMES & RICHARDSON, P.C.
405 Orange Street
New Haven, CT 06511
(203) 777-4425

DANIEL S. GOLDBERG
HEDIN & GOLDBERG
2100 Stevens Avenue South
Minneapolis, MN 55404
(612) 871-5500

Attorneys for *Amicus Curiae*
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION